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IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER KYNER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0608-CR-686
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Judge
Cause No. 49G02-0511-FA-192094

March 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Christopher Kyner ("Kyner") appeals from his convictions of Attempted Murder,[1] a Class A felony, three counts of Criminal Confinement,[2] all as Class B felonies, Attempted Robbery,[3] a Class B felony, and Carrying a Handgun Without a License,[4] as a Class C felony.[5] We affirm.

Issues

Kyner raises two issues on appeal:

I. Whether the trial court erred in admitting evidence found during the execution of a search warrant, which was founded upon a prior entry of the same premises to make an arrest allegedly conducted in violation of the U.S. and Indiana Constitutions; and

II. Whether Kyner's sentence was appropriate.

Facts and Procedural History

Krystal Floyd ("Floyd"), Greg Howard ("Howard"), Brandon Smith ("Smith"), Lauren Spalding ("Spalding"), and Jason Walker ("Walker") all lived in Apartment C at 5313 Tara Court North ("Apartment C") in Indianapolis. On October 31, 2005, they threw a small birthday party for Howard at Apartment C. Later that evening, Floyd and Howard

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[1] Ind. Code § 35-41-5-1, I.C. § 35-42-1-1.

[2] I.C. § 35-42-3-3.

[3] I.C. § 35-41-5-1, I.C. § 35-42-5-1.

[4] I.C. § 35-47-2-1.

[5] We would remind counsel for Appellant of the obligation under Indiana Appellate Rule 46(A)(10) to include a copy of the sentencing order in the Appellant's Brief. The Appellant included a copy of the abstract of judgment rather than the sentencing order.

went to bed, while Smith, Spalding, and Walker continued the party in the living room. In the early morning hours of November 1, 2005, Kyner arrived at Apartment C, was let in by Smith, and stayed for only ten to fifteen minutes. Smith, Spalding, and Walker had met Kyner before, but only knew him by his street name of "Murder." Prior to his departure, Kyner said "I'm gonna' go kill somebody tonight so if you hear anything, you don't know me." Trial Transcript at 161.

Shortly thereafter, someone knocked at the door of Apartment C. Smith, expecting one of his friends, opened the door to find a man wearing a white hockey mask. Smith immediately recognized the man as "Murder"/Kyner based on his features, voice, and his clothing. Kyner stepped into the apartment, holding a handgun, and said "I want everything." Tr. at 164. Then Kyner, shut the door, locked it, and waved the handgun in the air while ordering Smith, Spalding, and Walker to the ground. After initially complying with Kyner's orders by kneeling on the ground, Smith told Kyner "You're gonna' have to do something, you're gonna' have to do it." In response to the challenge, Kyner shot Smith in the face at a distance of only three feet.

Smith stumbled to the back bedroom of the apartment, and Kyner followed him. With Kyner out of the room, Spalding and Walker ran out of the apartment.

Once Smith reached the back bedroom, he opened the bedroom door and stumbled over Howard, who had approached the bedroom door after hearing the gunshots. Smith and Howard went into the closet while Floyd hid behind the bedroom door. Kyner came into the bedroom and again demanded "Give me all you got." Tr. at 126. After receiving no

response, Kyner left Apartment C.

Detective Randall Cook ("Detective Cook") was assigned to the investigation. He learned that the witnesses to the shooting only knew the suspect as "Murder." Through the investigation of a robbery at a nearby Village Pantry, Detective Cook received information that Kyner was known as "Murder."

On November 5, 2005, Indianapolis Police Officer Jason Zotz ("Officer Zotz"), among others, was dispatched to Apartment H at 3251 Tara Court East to locate Kyner based on active arrest warrants. After knocking on the door to Apartment H in the 3251 building and receiving no response, Officer Zotz walked back to his car. A female stopped Officer Zotz to inquire about whom he was trying to find. Upon Officer Zotz explaining that he was looking for Kyner, the female told him that Kyner was in Apartment H of building 3261, rather than building 3251.

Officer Zotz proceeded to Apartment H of building 3261 ("Apartment H") and knocked on the door. A black female answered the door. After explaining to the woman that he was looking for Kyner, Officer Zotz asked if he could walk through the apartment to check for Kyner, and the woman agreed. Subsequently, Officer Zotz found Kyner in a back room of Apartment H hiding on the couch underneath a blanket and subsequently arrested him. Pursuant to instructions given to him earlier in the day, Officer Zotz notified Detective Cook that Kyner had been arrested at Apartment H. While other officers remained at Apartment H to secure the premises, Detective Cook obtained a search warrant for the apartment. During the execution of the search warrant, the police found a white hockey mask

underneath the couch where Kyner had been found earlier.

The State charged Kyner with Attempted Murder, a Class A Felony, three counts of Criminal Confinement, all as Class B felonies, Attempted Robbery, as a Class B felony, and Carrying a Handgun Without a License, as a Class A misdemeanor. On June 12, 2006, Kyner filed a motion to suppress, alleging his arrest and the subsequent search of the apartment where Kyner was found violated his constitutional right, under both the U.S. and Indiana Constitutions, to be free from unreasonable searches and seizures. Kyner based this allegation on his contention that there was no probable cause to believe that Kyner was the same person as "Murder", to believe that Kyner was located at Apartment H, or to believe that Kyner had committed or attempted to commit a crime. After a hearing on June 21, 2006, the trial court denied Kyner's motion.

Following a two-day trial, the jury found Kyner guilty on all counts. The conviction for Carrying a Handgun Without a License was enhanced to a Class C felony based on Kyner admitting to a prior felony theft conviction. At the sentencing hearing, the trial court found one mitigator, Kyner's young age of twenty-two, but gave it little weight due to Kyner's extensive criminal record. The trial court found two aggravating factors of Kyner's extensive criminal history and that Kyner was on probation in two separate cases at the time of the current offense. The trial court sentenced Kyner to forty years for Attempted Murder, fifteen years for Attempted Robbery, ten years on each conviction for Criminal Confinement, and two years for the handgun conviction. The sentences on the counts of Attempted Robbery, Criminal Confinement, and Carrying a Handgun Without a License were imposed

concurrently to each other, but were imposed consecutively to the Attempted Murder conviction, resulting in a fifty-five year aggregate sentence.

Kyner now appeals.

Discussion and Decision

I. Admission of Evidence

Kyner argues that his seizure during the initial search of Apartment H violated his constitutional rights, because the State failed to show that the woman who consented to the search had the authority to do so. Due to this deficiency in the initial search, Kyner asserts the warrant used to effectuate the later search of Apartment H did not have the required probable cause. The State contends that Kyner lacks standing to raise a Fourth Amendment or an Article I, Section 11 challenge, because there is no evidence in the record that Kyner lived in Apartment H, was on the lease, or was an overnight guest.

Under the Fourth Amendment, an individual's right against unreasonable searches and seizures is personal. Best v. State, 821 N.E.2d 419, 424 (Ind. Ct. App. 2005), reh'g denied, trans. denied. To challenge a search, a defendant must have a legitimate expectation of privacy in the place searched. Id. When the constitutionality of a search is challenged, defendant has the burden of demonstrating a legitimate expectation of privacy in the premises searched. Matson v. State, 844 N.E.2d 566, 570 (Ind. Ct. App. 2006), trans. denied. An overnight guest has a legitimate expectation of privacy in his host's home and may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the owner of the premises may not. Id.

Here, Kyner asserts that he does have standing because "he demonstrated an actual expectation of privacy: He remained in a back bedroom, covered by a blanket." Appellant's Br. at 11. Hiding from police in another person's apartment does not confer standing. Kyner must demonstrate that he lived in Apartment H, was on the lease of the apartment, or was at least an overnight or frequent guest of the apartment owner. Kyner does not even address what his status was in relation to Apartment H other than noting in passing that he "may have been a guest in the apartment." Id. Kyner has not fulfilled his burden of demonstrating that he had a legitimate expectation of privacy in Apartment H, and thus, does not have standing to challenge the search under the Fourth Amendment.

Article I, Section 11 of the Indiana Constitution provides an independent prohibition against unreasonable searches and seizures. This state constitutional right is also a personal right. Peterson v. State, 674 N.E.2d 528, 533 (Ind. 1996), reh'g denied. To establish standing to challenge a search under Article I, Section 11, a defendant must show that the illegal search or seizure actually concerned his person, house, or effects. Id. at 534. When challenging the search of a dwelling, a defendant must establish that he had ownership, control, possession, or interest in either the premises searched or the property seized. Id.

The initial search of Apartment H did not result in the seizure of any property, so Kyner must demonstrate that he had ownership, control, possession, or interest in the apartment. As noted in the above Fourth Amendment analysis, Kyner has made no attempt to demonstrate that he had ownership, control, possession, or interest in Apartment H. Rather, Kyner only makes a reference in passing as to what was his status in the apartment.

Without the requisite showing, Kyner does not have standing to challenge the search of the apartment under the Indiana Constitution.

II. Appropriateness of Sentence

Kyner also argues that his sentence is inappropriate in light of the nature of the offenses and his character. Specifically, Kyner asserts that the trial court erred in setting his sentence ten years above the advisory term of thirty years for Attempted Murder, because his past felony convictions were not violent crimes. Pursuant to Indiana Appellate Rule 7(B), he seeks revision of his sentence.

Indiana Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due considerations of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Because Kyner's argument is based on his past conduct, he really only argues that his sentence is inappropriate in light of his character.

In general, sentencing determinations are within the trial court's discretion. Cotto v. State, 829 N.E.2d 520, 523 (Ind. 2005). Indiana Code Section 35-38-1-7.1(b) provides that the court may consider mitigating circumstances. However, "[a] court may impose any sentence that is authorized by statute and permissible under the Constitution of the State of Indiana, regardless of the presence or absence of aggravating circumstances or mitigating circumstances." I.C. § 35-38-1-7.1(d).

"Because the new sentencing statute provides a range with an advisory sentence rather than a fixed or presumptive sentence, a lawful sentence would be one that falls within the

sentencing range for the particular offense." Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005). The sentence imposed upon Kyner was within the Class A felony sentencing range of between twenty and fifty years.

However, the trial court specifically found aggravators and mitigators in accordance with Indiana Code Section 35-38-1-3, which provides in relevant part:

> The court shall make a record of the [sentencing] hearing, including:
>
> (1) a transcript of the hearing;
> (2) a copy of the presentence report; and
> (3) if the court finds aggravating circumstances or mitigating circumstances, a statement of the court's reasons for selecting the sentence that it imposes.

In imposing a sentence in excess of the advisory term of thirty years, the trial court found in aggravation that Kyner has a history of criminal or delinquent activity and that he was on two separate probations at the time of the current offense. The Court found Kyner's young age of twenty-two as the only mitigator, but noted that it held little weight in light of his extensive criminal history.

Concerning the character of the offender, Kyner's extensive history with the legal system demonstrates that prior rehabilitative efforts have failed. As a juvenile, Kyner had true findings for two counts of child molesting, one count of fleeing law enforcement, one count of auto theft, and operating a vehicle having never received a license. As an adult, Kyner was convicted of operating a vehicle having never received a license, public intoxication, criminal conversion, theft, battery, and criminal trespass. Furthermore, Kyner was on probation for two separate offenses at the time he committed the current offenses. Additionally, while Kyner does not make an argument on this basis, the nature of the

offenses is that Kyner told his acquaintances that he would kill someone that night. After spending time with Smith, Spalding, and Walker, he came back to their apartment to rob them and then shot Smith in the face at a distance of three feet. In light of the character of the offender and the nature of the offenses, we do not find Kyner's sentence inappropriate.

Conclusion

Because Kyner did not demonstrate that he had ownership, control, possession, or an interest in the apartment where he was found, he did not have standing to challenge the search. Kyner also has not established that his forty-year sentence for Attempted Murder is inappropriate.

Affirmed.

VAIDIK, J., and BARNES, J., concur.